



6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 80

[EPA-HQ-OAR-2011-0135; FRL_9941-85-OAR]

RIN 2060-AS36

Amendments Related to: Tier 3 Motor Vehicle Emission and Fuel Standards

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency (EPA) is taking final action on technical corrections and clarifications withdrawn from a previous direct final rule that amended provisions from the April 2014 Tier 3 final rulemaking and the July 2014 Quality Assurance Program final rulemaking. The regulatory changes being finalized in this final rule correct errors identified by the commenters and provide more clarity in the regulations to ensure that the regulations properly reflect the requirements established in those rules.

DATES: This final rule is effective on **[Insert date 60 days from date of publication in the Federal Register]**.

ADDRESSES: The EPA has established a docket for this action under Docket ID No. EPA-HQ-OAR-2011-0135. All documents in the docket are listed on the <http://www.regulations.gov> web site. Although listed in the index, some information is not publicly available, e.g., CBI or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available electronically through <http://www.regulations.gov>.

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SUPPLEMENTARY INFORMATION:

Does this Action Apply to Me?

Entities potentially affected by this rule include gasoline refiners and importers, ethanol producers, ethanol denaturant producers, butane and pentane producers, gasoline additive manufacturers, transmix processors, terminals, and fuel distributors.

Potentially regulated categories include:

| Category | NAICS ^a Code | Examples of Potentially Affected Entities |
|----------|-------------------------|---|
| Industry | 324110 | Petroleum refineries (including importers) |
| Industry | 325110 | Butane and pentane manufacturers |
| Industry | 325193 | Ethyl alcohol manufacturing |
| Industry | 324110, 211112 | Ethanol denaturant manufacturers |
| Industry | 211112 | Natural gas liquids extraction and fractionation |
| Industry | 325199 | Other basic organic chemical manufacturing |
| Industry | 486910 | Natural gas liquids pipelines, refined petroleum products pipelines |
| Industry | 424690 | Chemical and allied products merchant wholesalers |
| Industry | 325199 | Manufacturers of gasoline additives |
| Industry | 424710 | Petroleum bulk stations and terminals |
| Industry | 493190 | Other warehousing and storage- bulk petroleum storage |

^a North American Industry Classification System (NAICS).

This table is not intended to be exhaustive, but rather provides a guide for readers regarding entities likely to be regulated by this action. This table lists the types of entities that EPA is now aware could potentially be regulated by this action. Other types of entities not listed in the table could also be regulated. To determine whether your activities are regulated by this action, you should carefully examine the applicability criteria in the referenced regulations. If you have any questions regarding the applicability of this action to a particular entity, consult the person listed in the preceding **FOR FURTHER INFORMATION CONTACT** section.

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I. Introduction

In this action we are finalizing amendments withdrawn from a February 2015 direct final rule and parallel Notice of Proposed Rulemaking (80 FR 9078 and 80 FR

8826, February 19, 2015). Both of those actions were initiated to correct and clarify various provisions of the Tier 3 Motor Vehicle Emission and Fuel Standards (“Tier 3”) rule without either expanding or making substantive changes to the applicable provisions. We also stated that if we received adverse comment by April 6, 2015, as to any part of the direct final rule, those parts would be withdrawn by publishing a timely notice in the Federal Register. We received adverse comment on three specific amendments – two provisions intended to correct and clarify portions of the Tier 3 rule (79 FR 23414, April 28, 2014) and one intended to clarify an aspect of the Renewable Fuel Standard (RFS) Renewable Identification Number (RIN) Quality Assurance Program (“QAP”) rule (79 FR 42078, July 18, 2014). We withdrew all of the proposed amendments that received adverse comment, and they did not take effect. These changes are discussed in Sections II and III.

II. Quality Assurance Program Amendments for the Renewable Fuel Standard Program

In the final QAP rule (79 FR 42078, July 18, 2014), the EPA added additional product transfer document (PTD) requirements for renewable fuels that informed parties who took ownership of renewable fuel that they would need to (a) use the fuel as it was intended, i.e., for transportation use; and (b) incur a renewable volume obligation (RVO) if the fuel was exported. Shortly after publication of the QAP final rule, we received questions on whether these PTD requirements would apply downstream to the end users, including residential heating oil owners and individuals filling up their vehicle fuel tanks

at fuel retail stations. The EPA provides downstream end-user exemptions to the PTD requirements in other fuels programs, and the February 2015 direct final rule included similar exemptions for RFS PTD requirements. However, when the introductory text of 40 CFR 80.1453(a) was amended in the February 2015 direct final rule and parallel proposed rule to provide these exemptions for RFS PTD requirements, the words “custody or” were inadvertently added. The addition of the language “custody or” would have further changed this provision such that we would also be adding PTD requirements to the transfer of custody of renewable fuels, which was not our intent. We received several comments pointing out that this would be costly to industry and not beneficial to the RFS program. Commenters noted that applying PTD requirements to transfers of custody went beyond the PTD requirements of all other 40 CFR part 80 fuels programs, and would impose a new obligation on several parties in the fuel supply chain who otherwise do not have specific PTD obligations.

The February 2015 direct final rule and parallel proposal also included an amendment to the introductory text of 40 CFR 80.1453(a)(12) to remove an extraneous reference to §80.1433, as this section does not exist in the regulations (80 FR 9084, February 19, 2015). We did not receive any adverse comments on this amendment.

In this action, we are finalizing the originally intended changes to 40 CFR 80.1453: in the introductory text of paragraph (a), we are providing downstream end-user exemptions to the PTD requirements in the RFS program similar to other EPA fuels programs, without the “custody or” language that was inadvertently added in the

February 2015 direct final rule and parallel proposal; and, in the introductory text of paragraph (a)(12), we are deleting the extraneous reference to §80.1433.

III. Tier 3 Gasoline Sulfur Program Amendments

After promulgation of the Tier 3 final rulemaking (79 FR 23414, April 28, 2014), we discovered some typographical errors and other imprecise language in the fuels regulations of 40 CFR part 80 that we believed would benefit from additional clarity. Subsequently, we published amendments to certain provisions, including 40 CFR 80.1616 and 80.1621 in the February 2015 direct final rule and parallel proposal (80 FR 9078 and 80 FR 8826, February 19, 2015). We explained that these amendments would correct and/or clarify various provisions of the Tier 3 rule without either expanding or making substantive changes to the applicable provisions. We received adverse comment on the amendments to 40 CFR 80.1616 and 80.1621. We are responding to those comments and finalizing changes to these provisions in this action, as described further below.

A. Amendments to 40 CFR 80.1616

In the parallel proposal, we proposed to amend 40 CFR 80.1616(a) to correct a numbering error. The regulations currently jump from paragraph (a)(3) to (a)(5), so we added a “Reserved” paragraph (a)(4) for continuity in the February direct final rule. We

did not receive adverse comment on this amendment. We are now finalizing this amendment in this action.

We also proposed a clarifying amendment to 40 CFR 80.1616(b)(2). In the April 2014 Tier 3 final rule, we finalized language in paragraph (b)(2) specifying that credits generated relative to the Tier 2 gasoline sulfur standard of 30 parts per million (ppm) will expire “after March 31, 2020, when the 2019 annual compliance report is due.” The intent of this language was to state that unused credits (that are still valid for use) that were generated relative to the 30 ppm Tier 2 gasoline sulfur standard would expire at the end of the 2019 compliance year (December 31, 2019), and must be reconciled in the 2019 annual compliance report. Refiners and importers are required to submit their annual compliance reports for the 2019 compliance year by March 31, 2020. (Compliance reports for a given year are due on March 31 of the following year.) We also note that in the Tier 3 final rule preamble we specified that all credits generated relative to the Tier 2 30 ppm sulfur standard prior to January 1, 2017 would be valid for five years or through December 31, 2019, whichever is earlier. (79 FR 23547, April 28, 2014.) In the Tier 3 Gasoline Sulfur program, as with all of our 40 CFR part 80 fuels programs, credits that expire on December 31 of a given year must be retired and reconciled in that year’s annual compliance report, which is due on March 31 of the following year. The language we finalized in the Tier 3 final rule regulations was intended to express this. However, following promulgation of the Tier 3 final rule, we were contacted by regulated entities who believed that the language was confusing and suggested that we should edit the language to clarify that the credits themselves expire on

December 31, 2019 and must be reconciled in the 2019 annual compliance report (due on March 31, 2020). We proposed to amend the language of 40 CFR 80.1616(b)(2) in the proposal accompanying the February 2015 direct final rule to make this clarification.

We received adverse comments on the clarifying amendment regarding the expiration of the credits on December 31, 2019. These comments advocated for small refiners and small volume refineries to be allowed to use credits for five years in all cases (i.e., past December 31, 2019, for those credits where December 31, 2019 would be earlier than five years). The Tier 3 rule established January 1, 2020 as the date small refiners and small volume refineries must begin complying with the 10 ppm sulfur standard, and also as the date that credits generated relative to the Tier 2 program 30 ppm sulfur standard will no longer be available to use for compliance. EPA explained in the Tier 3 final rule (79 FR 23547, April 28, 2014), that it is important for the Tier 3 sulfur program to be fully implemented and enforceable beginning January 1, 2020, in part because it provides a date certain to give auto manufacturers greater confidence in designing their vehicles that the in-use sulfur level will be at a 10 ppm average. Allowing credits generated against the 30 ppm standard to be used for compliance with the 10 ppm standard past December 31, 2019 would likely allow higher sulfur levels to continue well beyond January 1, 2020.

The proposed amendment to 40 CFR 80.1616(b)(2) was simply intended to ensure

that the regulations clearly reflected EPA's interpretation of the applicable requirement¹, not to reopen the opportunity for comments on the issue of previous actions taken on credit generation and use periods for small refiners and small volume refineries.

Therefore, EPA considers these comments as beyond the scope of the technical amendments. However, to the extent a response is required, we continue to believe that this issue was properly addressed in the April 2014 Tier 3 Final Rule, for the reasons stated above and in that rulemaking. Therefore, in this action, we are finalizing the amendment as originally published in the direct final rule.

B. Amendments to 40 CFR 80.1621

Following publication of the April 2014 Tier 3 Final Rule, we were contacted by some refiners to clarify if or when small volume refineries could be disqualified from receiving small volume refinery status. At that time, we learned that a provision providing the disqualification criteria for small volume refineries had been inadvertently deleted from the regulatory text of the Tier 3 final rule. The regulations specified in 40 CFR 80.1622(e) that a "refiner who qualifies as a small refiner or small volume refinery under this subpart and subsequently fails to meet all the qualifying criteria as set out in §§80.1620 and 80.1621 will be disqualified pursuant to §80.1620(f) or §80.1621(d)." The criteria and process for disqualifying small refiners appears in 40 CFR 80.1620(f), but there is no 40 CFR 80.1621(d) that provides similar criteria for disqualifying small

¹ EPA does not believe that the prior language could reasonably be interpreted to allow regulated parties to use credits in compliance demonstrations after the 2019 demonstration due March 31, 2020, particularly in light of the preamble discussion, but proposed edits to remove any doubt regarding the last date to utilize credits and the due date of the associated compliance demonstration.

volume refineries. The provision was inadvertently deleted prior to publication of the Tier 3 rule. We proposed to restore the language that was intended to be included in 40 CFR part 80, and as previously noted, is currently referenced in 40 CFR 80.1622(e).

We received adverse comment on the amendments to 40 CFR 80.1621 arguing that:

- EPA neither proposed nor finalized disqualification criteria for small volume refineries for the April 2014 Tier 3 rule, and thus did not provide regulated entities the opportunity to comment on the 20-day notification requirement following disqualification, and further that the restoration of 40 CFR 80.1621(d) was not a technical amendment.
- The wording of the February 2015 direct final rule and parallel proposal is confusing because it does not explicitly state exactly when and under which circumstances disqualification could occur.
- Small volume refineries should not be constrained or treated differently than small refiners regarding disqualification, including in the case of growth or mergers.
- The term “small refinery” was used instead of the correct term “small volume refinery.”
- EPA did not clarify if credits could continue to be generated during the 30-month grace period allowed for a disqualified small volume refinery to come into compliance.

- 40 CFR 80.1621 should be reorganized – disqualification criteria should not appear in this section of the regulations.

Our intent in the February 2015 direct final rule and parallel proposal was to correct an inadvertent omission of regulatory text for the disqualification of small volume refineries as discussed in the Tier 3 final rule preamble. (This discussion can be found at 79 FR 23552-53, April 28, 2014.) We explained (in both the April 2014 Tier 3 final rule, and in the February 2015 actions) that the application process for qualification for small volume refinery status was similar to the process for small refiner status. We further explained that a small refiner that owned and operated a small volume refinery would only need to apply for small refiner status. As explained above, the fact that the deletion of 40 CFR 80.1621(d) was inadvertent can be seen from the cross-reference to this provision in 40 CFR 80.1622(e) in both the proposed and final Tier 3 rule regulations. Thus, as previously explained, the amendment was intended to fix an omission, which was merely to restore 40 CFR 80.1621(d).

The inadvertent deletion of 40 CFR 80.1621(d) can be seen from the reference in 40 CFR 80.1622(e) in both the proposed and final regulations, which states that “A refiner who qualifies as a small refiner or small volume refinery under this subpart and subsequently fails to meet all the qualifying criteria as set out in §§80.1620 and 80.1621 will be disqualified pursuant to §80.1620(f) or §80.1621(d).” (79 FR 23662, April 28, 2014.) Further, the Tier 3 final rule preamble reflected our discussion of the similar treatment of both small volume refineries and small refiners, as evidenced by 40 CFR

80.1622. (79 FR 23549-23550, 23552-23553; April 28, 2014.) Moreover, the current small refiner disqualification provision at 40 CFR 80.1620(f), which contains both disqualification criteria and 20-day notification requirements, is analogous to the 40 CFR 80.1621(d) small volume refinery disqualification provision. Again, the April 2014 final Tier 3 rule intended for small refiner and small volume refinery qualification and disqualification for the Tier 3 program to be similar.

Regarding the comments that EPA should clarify when a disqualifying event occurs, we note that this would not be retroactive. Rather, such disqualification would occur after the effective date of the amended 40 CFR 80.1621(d), which is being amended in this regulatory action. For example, a refiner whose refinery was approved as a small volume refinery in 2015 prior to the restoration of 40 CFR 80.1621(d) would not be disqualified before the effective date of this final rulemaking. As such, the 30-month grace period afforded to small refiners and small volume refineries to come into compliance with the Tier 3 sulfur standards would not begin until the point that the refiner or its refinery is disqualified.

With regard to comments about the treatment of small volume refineries and small refiners with regard to growth or merger, we note that this is outside the scope of the rulemaking. While our intent with the Tier 3 program is to treat small refiners and small volume refineries similarly, there are some differences between small refiners and small volume refineries that require separate treatment, such as in the case of mergers.

As explained in the Tier 3 final rule, the Regulatory Flexibility Act (RFA) generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements under the Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions. As also explained in the preamble to the Tier 3 final rule, in accordance with the Regulatory Flexibility Act, as amended by the Small Business Regulatory Enforcement Fairness Act (RFA/SBREFA), we assessed the impacts of the rule on small entities. For refiners, a small entity is defined in the Small Business Administration's size standards² as a refiner whose company-wide employee count is 1,500 employees or fewer across all of the refiner's facilities. Small volume refineries are individual *facilities* – and these facilities may be owned by a refiner that does not meet the definition of a small entity. This assessment can be found in Section XII.C of the preamble to the Tier 3 final rule (79 FR 23624-26, April 28, 2014).

Further, we finalized a “small volume refinery” definition in the Tier 3 program because, as stated in the preambles to both the proposed and final rulemakings, our modeling during the development of the Tier 3 program showed that the cost of compliance could be higher for certain facilities. We explained that some of these facilities, which may be owned by refiners that would not qualify as small entities, could potentially benefit from additional time for compliance with the Tier 3 program. Thus,

² 13 CFR 121.201.

we included flexibilities for small volume refineries that are similar to those for small refiners.³

We note that the Tier 3 program's *small volume refinery* provisions are separate from the RFS program's *small refinery* provisions. The RFS program is required by statute to provide specific provisions for small refineries.⁴ While EPA chose to use the same 75,000 barrel threshold for Tier 3 small volume refineries that the RFS program uses for small refineries, we note that the choice to extend flexibilities to small volume refineries in the Tier 3 program was not a statutory requirement as with the RFS program. With the exception of the RFS program, the Tier 3 program is the first EPA fuels program under 40 CFR part 80 in which we have offered flexibilities based on facility size.

Regarding comments requesting more clarity in the language of 40 CFR 80.1621(d), we note that the February 2015 direct final rule and parallel proposal used the imprecise term "small refinery" in place of the correct term "small volume refinery," and we are correcting this language in this action. As disqualification is not meant to disallow the generation and use of credits during the 30-month period that is afforded to small refiners and small volume refineries to come into compliance with the Tier 3 program following a disqualifying event, clarifying language is also being added with this action. Lastly, we believe the comments regarding organization of this section of the regulations are outside of the scope. We also note that this organization is used in both

³ 79 FR 23549, April 28, 2014.

⁴ CAA section 211(o)(1)(K).

the small refiner and small volume refinery provisions, to ensure that aspects of small refiner and small volume refinery qualification and related requirements were intentionally contained in the same sections of the regulations to provide a more streamlined approach for these parties to locate this information.

Thus, in this action, we are finalizing the restoration of 40 CFR 80.1621(d), with changes to ensure that the correct terminology (“small volume refinery”) is used, and to clarify when a disqualifying event could occur and that credits can be generated during the 30-month period following disqualification.

IV. Statutory and Executive Order Reviews

Additional information about these statutes and Executive Orders can be found at <http://www2.epa.gov/laws-regulations/laws-and-executive-orders>.

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is a significant regulatory action that was submitted to the Office of Management and Budget (OMB) for review. Any changes made in response to OMB recommendations have been documented in the docket.

B. Paperwork Reduction Act

This action does not impose any new information collection burden under the PRA, since it merely clarifies and corrects existing regulatory language. OMB has previously approved the information collection activities contained in the existing regulations and has assigned OMB control numbers as noted in the table below.

| Regulatory Citation | Item | OMB Control Number |
|---------------------|-----------------------|--------------------|
| 40 CFR part 80 | In-use fuel standards | 2060-0437 |

C. Regulatory Flexibility Act (RFA)

I certify that this action will not have a significant economic impact on a substantial number of small entities under the RFA. In making this determination, the impact of concern is any significant adverse economic impact on small entities. An agency may certify that a rule will not have a significant economic impact on a substantial number of small entities if the rule relieves regulatory burden, has no net burden or otherwise has a positive economic effect on the small entities subject to the rule. This rule merely clarifies and corrects existing regulatory language. We therefore anticipate no costs and therefore no regulatory burden associated with this rule. We have therefore concluded that this action will have no net regulatory burden for all directly regulated small entities.

D. Unfunded Mandates Reform Act

This action does not contain any unfunded mandate as described in UMRA, 2 U.S.C. 1531–1538, and does not significantly or uniquely affect small governments. The action imposes no enforceable duty on any state, local or tribal governments. Requirements for the private sector do not exceed \$100 million in any one year.

E. Executive Order 13132: Federalism

This action does not have federalism implications. It will not have substantial direct effects on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government.

F. Executive Order 13175: Consultation and Coordination with Indian Tribal Governments

This action does not have tribal implications as specified in Executive Order 13175. This rule merely corrects and clarifies regulatory provisions. Tribal governments would be affected only to the extent they purchase and use regulated vehicles or engines. Thus, Executive Order 13175 does not apply to this action.

G. Executive Order 13045: Protection of Children from Environmental Health Risks and Safety Risks

EPA interprets Executive Order 13045 as applying only to those regulatory actions that concern environmental health or safety risks that the EPA has reason to believe may disproportionately affect children, per the definition of “covered regulatory action” in section 2-202 of the Executive Order. This action is not subject to Executive Order 13045 because it does not concern an environmental health risk or safety risk.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not a “significant energy action” because it is not likely to have a significant adverse effect on the supply, distribution or use of energy.

I. National Technology Transfer Advancement Act

This rulemaking does not involve technical standards.

J. Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations

This action is not expected to have any adverse human health or environmental impacts; as a result, the human health or environmental risk addressed by this action will not have potential disproportionately high and adverse human health or environmental effects on minority, low-income or indigenous populations.

K. Congressional Review Act

This action is subject to the CRA, and EPA will submit a rule report to each House of the Congress and to the Comptroller General of the United States. This action is not a “major rule” as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 80:

Environmental protection, Administrative practice and procedure, Air pollution control, Confidential business information, Diesel fuel, Fuel additives, Gasoline, Imports, Penalties, Petroleum, Reporting and recordkeeping requirements.

Dated: April 12, 2016.

Gina McCarthy,

Administrator.

For the reasons set forth in the preamble, EPA amends 40 CFR part 80 as follows:

PART 80—REGULATION OF FUELS AND FUEL ADDITIVES

1. The authority citation for part 80 continues to read as follows:

Authority: 42 U.S.C. 7414, 7521, 7542, 7545, and 7601(a).

Subpart M-- Renewable Fuel Standard

2. Section 80.1453 is amended by revising paragraphs (a) introductory text and (a)(12) introductory text to read as follows:

§ 80.1453 What are the product transfer document (PTD) requirements for the RFS program?

(a) On each occasion when any party transfers ownership of neat and/or blended renewable fuels, except when such fuel is dispensed into motor vehicles or nonroad vehicles, engines, or equipment, or separated RINs subject to this subpart, the transferor must provide to the transferee documents that include all of the following information, as applicable:

* * * * *

(12) For the transfer of renewable fuel for which RINs were generated, an accurate and clear statement on the product transfer document of the fuel type from Table 1 to § 80.1426, and designation of the fuel use(s) intended by the transferor, as follows:

* * * * *

Subpart O—Gasoline Sulfur

3. Section 80.1616 is amended by adding and reserving paragraph (a)(4) and revising paragraph (b)(2) to read as follows:

§ 80.1616 Credit use and transfer.

(a) * * *

(4) [Reserved]

* * * * *

(b) * * *

(2) Credits generated under § 80.1615(b) through (d) are valid for use for five years after the year in which they are generated, except that any CR_a credits generated in 2015 and 2016 and any remaining CR_{T2} credits will expire and become invalid after December 31, 2019 (with the 2019 annual compliance report, due March 31, 2020).

* * * * *

4. Section 80.1621 is amended by adding and reserving paragraph (c) and adding paragraph (d) to read as follows:

§ 80.1621 Small volume refinery definition.

* * * * *

(c) [Reserved]

(d)(1) A refinery approved as a small volume refinery under § 80.1622 that subsequently ceases production of gasoline from processing crude oil through refinery processing units or exceeds the 75,000 barrel average aggregate daily crude oil throughput limit is

disqualified as a small volume refinery. If such disqualification occurs, the refinery shall notify EPA in writing no later than 20 days following the disqualifying event.

(2) Any refinery whose status changes under this paragraph (d) shall meet the applicable standards of § 80.1603 within a period of up to 30 months from the disqualifying event.

[FR Doc. 2016-08912 Filed: 4/21/2016 8:45 am; Publication Date: 4/22/2016]